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6 IN THE UNITED STATES BANKRUPTCY COURT
7 FOR THE DISTRICT OF ARIZONA
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9
10 In Re

Chapter 11

11 SPECTRUM GOLF, INC.,

Case No. 02-15894-PHX-SSC

12
13 Debtor.

Adv. No. 02-1422

14 SPECTRUM GOLF, INC.,

MEMORANDUM DECISION

15
16 Plaintiff,

17 vs.

(Opinion to Post)

18 ROBERT A. CHITI,

19
20 Defendant.

21
22 **I. Preliminary Statement**

23 The Court bifurcated the trial in this adversary proceeding after reviewing the statutory
24 and case law, determining that Nevada law applied to the controversy between the parties, and
25 concluding that Nevada law required a separate hearing to assess the amount of punitive
26 damages once liability had been determined. The parties are referred to this Court's
27 Memorandum Decision, dated February 21, 2006, and this Court's clarification of that Decision
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1 as stated on the record on May 9, 2006, for a determination of the liability of Mr. Robert Chiti
2 and the reasons therefor. Those Decisions are incorporated herein by reference and made a part
3 of this Decision. On July 14, 2006, Mr. Chiti filed a Motion to Strike the testimony and report of
4 Mr. Greco and a memorandum of law in support of the Defendant's position. On July 14, 2006
5 and July 24, 2006, respectively, the Debtor filed a memorandum of law in support of the
6 reorganized Debtor's position and a response in opposition to the Motion to Strike.¹ This
7 Decision shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R.
8 Civ. P. 52, Bankruptcy Rule 7052. The Court has jurisdiction over this matter pursuant to the
9 consent of the parties to enter final orders in this adversary. 28 U.S.C. § 157(b)(2)(A) and (O).²

10 **II. Factual Discussion**

11 A. General Discussion.

12
13 Mr. Davin Dameron testified that he currently worked with Mr. Chiti at OpenTech and
14 had previously worked with Mr. Chiti and Mr. Greco at Spectrum Golf from 1999 to 2005. He
15 testified that he enjoyed working with Mr. Chiti and trusted him. He noted that everyone
16 working at Spectrum was very aware of Spectrum having filed a bankruptcy petition and, as a
17 result, their jobs might be eliminated. Mr. Greco, from time to time, talked about the ongoing
18 proceedings in the bankruptcy court. Mr. Dameron testified that at one point, Mr. Greco
19 became concerned that Mr. Chiti was providing information to, or advising, the Debtor's general
20 unsecured creditors' committee as to what action it should take. Mr. Dameron stated that Mr.
21 Greco had advised the Debtor's employees that he intended to sue Mr. Chiti for tortious
22 interference with the Debtor's contracts or business operations. Other than testifying as to a
23 stressful environment which probably occurs at most businesses when they file Chapter 11
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25 **1.** Defendant's counsel actually filed a pleading entitled "Defendant's Motion in Limine."
26 However, since such a motion is normally presented to the Court "before or during a trial," the
27 Court will consider the Motion as a Motion to Strike. Blacks Law Dictionary, 802 (Bryan A.
Garner, 8th ed., West 2004)

28 **2.** See Memorandum Decision dated February 21, 2006.

1 proceedings, it is difficult for this Court to determine the relevance of such testimony.

2 Mr. Michael Connolly testified that he had first met Mr. Chiti in the late 1980's, had kept
3 in contact with him, and had worked with Mr. Chiti on various projects over the years. He is
4 now in business with Mr. Chiti at OpenTech, and while Mr. Chiti is the Chief Executive Officer
5 and a member of the Board, Mr. Connolly is the Executive Vice President of Corporate
6 Development. Mr. Connolly is also on the Board of Directors and holds about a 10 percent
7 stockholder interest in OpenTech. He noted that Mr. Chiti was a good friend, a confidant, and
8 he trusted in his abilities.

9 Mr. Chiti testified that OpenTech had a patent, but it had not been mentioned in a press
10 release nor touted. He noted that OpenTech was a start-up operation, having opened in 2003.
11 He stated that the salary that he drew from OpenTech was minimal, having received \$50,000 in
12 salary in the last year.³ He noted that he had a net worth of only \$60,659.29, but he also placed
13 no value on his OpenTech stock. He testified, in a self-serving manner, that he had learned from
14 his mistakes at Spectrum. He had taken master of business administration classes, had picked
15 “the right people” to help him start OpenTech, had carefully reviewed the accounting practices
16 to be employed, and had regular Board Meetings at which minutes were taken. He believed that
17 he had “run into difficulties at the Debtor,” because he had trusted people, rather than doing his
18 own due diligence. He felt that he was being punished for doing what he thought was right at the
19 time.

20
21 The cross examination of Mr. Chiti reflected a far different picture. Mr. Chiti conceded
22 that he had sold product of his new company in an area where there was no sales person and had
23 “paid himself a commission.” Moreover, Mr. Chiti maintained a spreadsheet on the
24 commissions that he earned, and he wrote and signed the checks to pay himself. These actions
25 were taken by him irrespective of the fact that OpenTech had a treasurer at the time of the
26 transactions. Mr. Chiti conceded that he prepared his own expense reimbursements, that there
27 were no internal controls for the officers, and that although at least one deposit account at

28 **3.** See Exhibit KK.

1 OpenTech required a dual signature to disburse funds, no dual signature was required on the
2 officers' expense account. Quite simply Mr. Chiti could write a check for an improper
3 reimbursement, and no one would know.⁴ Despite Mr. Chiti's efforts to portray a man who had
4 learned from his mistakes, the Court came to a very different conclusion. Mr. Chiti had not
5 learned his lesson. He was still acting improperly although a fiduciary, with no adequate
6 controls in place, at his new Company, OpenTech.

7 As to the value of his shareholder interest, Mr. Chiti conceded that there had been 15 to
8 18 separate purchases of OpenTech stock by 15 separate individuals over the last 12 months. All
9 of the shares sold for 35 cents a share. Such testimony indicated that there was a market, albeit
10 for private investors, in the stock.

11 B. The Value of Mr. Chiti's interest in OpenTech Alliance, Inc.

12 The reorganized Debtor called Mr. Damian J. Greco as its expert witness to value Mr.
13 Chiti's interest in OpenTech Alliance, Inc. Mr. Chiti's counsel challenged the ability of Mr.
14 Greco to testify as an expert witness in this matter, and subsequently filed a Motion to Strike.
15 First, Mr. Greco has no professional credentials to appraise businesses or any interest therein.
16 He is not a member of one of the appraisal societies, and he is not familiar with the Uniform
17 Standards of Professional Appraisers. Second, Mr. Greco has not participated in any formal
18 programs to remain current on the methodology, ethics, and the best practices in appraising a
19 business or an interest in a business. Third, Mr. Greco has not been qualified as an expert
20 witness in any court proceedings. Fourth, given Mr. Greco's current duties as Chief Executive
21 Officer of Golf Switch and the reorganized Debtor, his impartiality as an expert witness could
22 reasonably be questioned. Fifth, Mr. Greco does not use any of the standard approaches to value
23 in valuing Open Tech.
24

25 However, Mr. Greco did receive a Masters in Business Administration from New York
26 University in 1971, specializing in corporate finance and securities analysis. Mr. Greco did

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28 **4.** Mr. Chiti conceded that although an operations manager did do a reconciliation of the
accounts, that manager had no access to the checks.

1 testify that he had 35 years of experience in valuing or appraising businesses and that during that
2 time he had “appraised 1,000 to 2,000 businesses.” He noted that he used a practical approach to
3 valuing businesses. Although Mr. Greco’s Background Summary reflects the analysis of various
4 operations for management for purposes of acquisitions or initial public offerings or the analysis
5 of financial operations to implement a credit policy or budget for various divisions, the Court
6 does not see any experience which relates to Mr. Greco’s appraising a business for third parties.⁵
7 He testified that in appraising Mr. Chiti’s interest in OpenTech, he used a “theoretical and
8 practical approach to valuation.”

9 The Court agrees, based upon the Defendant's Motion to Strike, that Mr. Greco's
10 testimony as an expert witness shall be disregarded by this Court. This Court must act as a
11 gatekeeper to determine whether expert testimony should be admitted under Fed. R. Evidence
12 702. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999). The United
13 States Supreme Court decision of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579,
14 113 S.Ct. 2786 (1993) sets out the standards for the federal court to determine whether a
15 particular individual should be allowed to testify as an expert in the scientific area. The four
16 guiding factors laid out by the Supreme Court in Daubert are the following: 1) whether the
17 underlying method can be or has been tested; 2) whether the method has been subject to peer
18 review and publication; 3) the method's known or potential error rate; and 4) the level of the
19 method's acceptance within the relevant discipline. Ultimately the Court should not allow an
20 individual to testify as an expert in a trial unless the matter is such that an expert is required to
21 assist the trier of fact in analyzing complex matters. If the matter is such that it requires an
22 expert, the expert must pass a rigorous test that considers the four factors set forth in Daubert

23 As was described by the Defendant's expert witness, Mr. Greco used a "practical rule of
24 thumb" to appraise the OpenTech stock which had not been tested by any other appraiser for
25 accuracy. Mr. Greco did not refer to any treatise, article, association, or other group of business
26 valuation experts which had reviewed and published particular findings as to the method utilized
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28 5. See Exhibit 5.

1 by Mr. Greco. Moreover, given that OpenTech was a start-up business, Mr. Greco's analysis of
2 value predicated on sales, even though the business was still incurring operational losses, seemed
3 particularly prone to error. Mr. Greco's approach was not an accepted method of valuing a
4 shareholder interest in a start-up entity that has been tested or relied upon in the valuation
5 community. Thus, none of the four factors has been shown by Mr. Greco.

6 The Court's reaction is that although Mr. Greco understands financial matters, he should
7 not be qualified as an expert in business valuation. The ability to review profit and loss
8 statements, balance sheets, and cash flow statements does not translate into an ability to value a
9 stock interest in a start-up technology company. Moreover, Mr. Greco is the Chief Executive
10 Officer of the reorganized Debtor. Depending on his analysis of this matter, the reorganized
11 Debtor will benefit from his analysis. In essence, Mr. Greco is not the traditional disinterested
12 appraiser.

13 Even if the Court's conclusion is incorrect, and Mr. Greco should be considered an expert
14 in the area of business valuation, the Court has a number of problems with Mr. Greco's report
15 which requires the Court to give it very little weight.⁶ First, Mr. Greco concedes that he has
16 limited data upon which to rely.⁷ Next, he has presented information upon which he heavily
17 relies which is not supported by any data. For instance, he estimates that the sales of OpenTech
18 will increase from \$699,546 in actual sales at the end of 2005 to estimated sales of \$1,400,000
19 by the end of 2006.⁸ He states at one point in his report: "Assuming the accelerated growth
20 pattern continues, which based upon the number of installations, is consistent with quarter over
21 quarter results, the 2006 annualized sales should at least double over prior years results."⁹
22 However, OpenTech mostly likely has competitors, and if the market has become saturated or
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24 **6.** See Exhibit 6.

25 **7.** Mr. Greco testified that he received limited data from OpenTech approximately 10
26 days prior to the start of this trial.

27 **8.** See Exhibit 6 at 1.

28 **9.** Id.

1 competitive, there is no guarantee that the sales will increase exponentially as described. Mr.
2 Greco also notes that the Company has not “broken even” in its operations indicating that its
3 start-up expenses may have been substantial. Again, there is no analysis concerning the
4 expenses, and what those expenses may be if sales increase so dramatically. At another point in
5 his report, he concedes that OpenTech is still reflecting a loss from operations. He then states
6 that given “the development requirements and marketing penetration demands,” which require
7 substantial overhead, OpenTech is performing in a typical manner.¹⁰ He states “the losses do not
8 affect the valuation criteria.”¹¹ However, the losses may have a tremendous impact on the value
9 of a start-up operation, if the company has insufficient capital. Such a scenario could lead to a
10 rapid collapse of the company and cause the shareholder interest to have little value. Mr. Greco
11 also relies only on the projected sales, or multiples thereof, as the basis to value OpenTech. He
12 then states, in a conclusory manner, that 3 times the “annualized sales” is a representative low
13 end of fair value. In this case, the sales are grossly overestimated. So, how is any value based
14 upon such a factor reliable? The Court rejects Mr. Greco’s conclusion that Mr. Chiti’s
15 ownership interest in OpenTech has a value of \$972,400. As to the Defendant’s Motion to
16 Strike, the Court concludes that Mr. Greco is not an expert and his report should be stricken from
17 the record. Even if the Court is incorrect on the Motion to Strike, for the reasons stated by the
18 Court, Mr. Greco’s testimony and report should be given little weight.

19 Mr. Chiti called Mr. Michael Gilburd as his expert witness. Mr. Gilburd had numerous
20 degrees and licenses, had participated in, or taught, numerous national seminars or courses, had
21 prepared reports for litigation, and had testified as an expert in business valuation.¹² Moreover,
22 he had been retained in various cases to value the interest of minority shareholders.¹³ He
23 testified that he has completed several thousand business valuations. Based upon his experience,
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25 **10. Id.** at 2.

26 **11. Id.**

27 **12. *See* Exhibit P.**

28 **13. Id.**

1 educational level, and licenses and degrees, the Court concludes that he is an expert in business
2 valuation.

3 Mr. Gilburd testified that he was familiar with the industry in which OpenTech operated.
4 He also noted that he was an independent appraiser, having no connection to Mr. Chiti, this
5 litigation, or OpenTech and that he considered the traditional three approaches to value in
6 appraising the Company. Of the asset, income, and market (sales) approach to value, Mr.
7 Gilburd testified that he utilized two methods from the asset approach, and one from the market
8 approach in valuing the Company. He noted that since OpenTech was still losing money from
9 its operations, he did not believe it was appropriate to use the income approach. He testified that
10 he had reviewed the patents that OpenTech had obtained, but he concluded that said patents,
11 through the asset and market approach to value, did not appreciably add to the value of
12 OpenTech. Mr. Gilburd concluded that although Mr. Chiti had warrants for the issuance of stock
13 to him at a later date, those warrants did not affect the value of Mr. Chiti's interest. Mr. Gilburd
14 arrived at an initial fair market value of \$1,030,631. Mr. Chiti's interest, thus, had an initial
15 value of \$222,616.¹⁴ Mr. Gilburd then noted that Mr. Chiti's minority interest would be difficult
16 to sell - even to a private investor, and that decisions could be made by management which
17 would not benefit this interest. He discounted Mr. Chiti's interest by 30 percent for this "lack of
18 control." Mr. Gilburd then opined that there was no accepted market for such a minority interest
19 in a start-up company and discounted Mr. Chiti's interest further. Mr. Gilburd concluded that
20 Mr. Chiti's interest in OpenTech had a value of \$120,727.

21 The Court has concerns about Mr. Gilburd's valuation. Although the Court may
22 question Mr. Gilburd's liquidation analysis, Mr. Gilburd's determination that Mr. Chiti's
23 warrants are worthless, and that the discount for lack of control is excessive given Mr. Chiti's
24 executive level and Board position with OpenTech, the Court concludes that the valuation is far
25 too low. Mr. Gilburd conceded that there had been a recent sale of stock by another individual
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28 **14.** The parties agreed on the extent of Mr. Chiti's fractional shareholder interest in
OpenTech. \$1,030,631 x Mr. Chiti's 21.6 % interest = \$222,616.

1 not in control of OpenTech at a value of 35 cents per share. Moreover, Mr. Chiti had confirmed
2 that 15 to 18 purchases of the OpenTech stock had occurred, with 15 individuals actually
3 acquiring the stock. Each purchaser paid 35 cents per share. With Mr. Chiti's interest in the
4 Company, that would translate to a stock value for Mr. Chiti of \$420,000. Given the excessive
5 discounts by Mr. Gilburd and his failure to take into account Mr. Chiti's management of
6 OpenTech, the warrants that Mr. Chiti had, and the recent purchases of minority interests in
7 OpenTech, the Court concludes that the value of Mr. Chiti's interest is \$420,000, which is the
8 amount of the recent stock sale per share (35 cents) times the number of shares held by Mr. Chiti
9 in OpenTech.

10 **III. Legal Discussion**

11 **A. Assessment of Punitive Damages**

12 In Nevada, punitive damages are authorized by statute. Nevada Revised Statute § 42.005
13 provides for an award of punitive damages upon a showing of fraud, oppression or malice by
14 clear and convincing evidence.¹⁵ Wichinsky v. Mosa, 109 Nev. 84, 847 P.2d 727 (Nev.1993).
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16 **15.** Nev. Rev. Stat. § 42.005 (West 2006) provides:

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18 1. Except as otherwise provided in NRS 42.007, in an action for the breach of an
19 obligation not arising from contract, where it is proven by clear and convincing evidence
20 that the defendant has been guilty of oppression, fraud or malice, express or implied, the
21 plaintiff, in addition to the compensatory damages, may recover damages for the sake of
22 example and by way of punishing the defendant. Except as otherwise provided in this
section or by specific statute, an award of exemplary or punitive damages made pursuant
to this section may not exceed:

23 (a) Three times the amount of compensatory damages awarded to the plaintiff if the
24 amount of compensatory damages is \$100,000 or more; or

25 (b) Three hundred thousand dollars if the amount of compensatory damages awarded to
26 the plaintiff is less than \$100,000.

27 2. The limitations on the amount of an award of exemplary or punitive damages
prescribed in subsection 1 do not apply to an action brought against:

28 (a) A manufacturer, distributor or seller of a defective product;

1 Furthermore, "conscious disregard" means knowledge of the probable harmful consequences of
2 a wrongful act and a willful and deliberate failure to act to avoid those consequences. *See Clark*
3 *v. Lubritz*, 113 Nev. 1089, 944 P.2d 861 (1997) (punitive damages assessed for breach of
4 fiduciary duty).

5 Punitive damages are not designed to compensate a party, but are awarded "for the sake
6 of example and by way of punishing the defendant." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev.
7 42, 846 P.2d 303, 304 (1993). "Punitive damages provide a means by which the community ...
8 can express community outrage or distaste for the misconduct of an oppressive, fraudulent or
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11 (b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;

12 (c) A person for violating a state or federal law prohibiting discriminatory housing
13 practices, if the law provides for a remedy of exemplary or punitive damages in excess
14 of the limitations prescribed in subsection 1;

15 (d) A person for damages or an injury caused by the emission, disposal or spilling of a
16 toxic, radioactive or hazardous material or waste; or

17 (e) A person for defamation.

18 3. If punitive damages are claimed pursuant to this section, the trier of fact shall make a
19 finding of whether such damages will be assessed. If such damages are to be assessed, a
20 subsequent proceeding must be conducted before the same trier of fact to determine the
21 amount of such damages to be assessed. The trier of fact shall make a finding of the
22 amount to be assessed according to the provisions of this section. The findings required
23 by this section, if made by a jury, must be made by special verdict along with any other
24 required findings. The jury must not be instructed, or otherwise advised, of the
25 limitations on the amount of an award of punitive damages prescribed in subsection 1.

26 4. Evidence of the financial condition of the defendant is not admissible for the purpose
27 of determining the amount of punitive damages to be assessed until the commencement
28 of the subsequent proceeding to determine the amount of exemplary or punitive damages
to be assessed.

5. For the purposes of an action brought against an insurer who acts in bad faith
regarding its obligations to provide insurance coverage, the definitions set forth in NRS
42.001 are not applicable and the corresponding provisions of the common law apply.

malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated." Ace Truck and Equipment Rentals, Inc. v. Kahn, 103 Nev. 503, 506, 746 P.2d 132 (Nev. 1987). The allowance or denial of exemplary or punitive damages rests entirely in the discretion of the trier of fact. Smith's Food & Drug Cntrs. v. Bellegarde, 114 Nev. 602, 606, 958 P.2d 1208, 1211 (1998); Ramada Inns v. Sharp, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985).

Nevada law permits the recovery of punitive damages, if there is a breach of fiduciary duty, even though the underlying nature of the agreement between the parties may be contractual. Such a conclusion is predicated on the fact that a breach of fiduciary duty is a separate tort upon which punitive damages may be assessed. Clark v. Lubritz, 113 Nev. 1089, 1097, 944 P.2d 861, 867 (1997).

Pursuant to NRS 42.005 (3) once a trier of fact makes a determination that punitive damages should be assessed, as this Court did in its prior Memorandum Decision, a "subsequent proceeding" must be conducted to determine the amount of said damages. In making a determination of punitive damages, a judge or a jury looks to the specific factors set forth in Ace Truck and Equipment Rentals, Inc. v. Kahn, 103 Nev. 503, 746 P.2d 132 (Nev. 1987). Those factors are as follows:

1. Financial position of the Defendant;
2. culpability and blameworthiness of the tortfeasor;
3. vulnerability and injury suffered by the offended party;
4. the extent to which the punished conduct offends the public's sense of justice and propriety; and
5. the means which are judged necessary to deter future misconduct of this kind.

Ace at 137.

The Nevada Supreme Court has recently revised the appropriate test to impose punitive damages under Nevada law. In the decision of Bongiovi v. Sullivan, 138 P.3d 433 (Nev. 2006), the Court concluded that the factors to be considered under Nevada law varied slightly from the factors to be considered under the 14th Amendment to the United States Constitution to accord a defendant due process of law. Id. at 452. Thus, the Court adopted the standards set forth in BMW of North America, Inc. v. Ira Gore, Jr., 517 U.S. 559, 575, 580, 583, 116 S.Ct. 1589

1 (1996), to obviate the need for a review under both state and federal law to determine the
2 excessiveness of the award. Id. Given the recent change in Nevada law, this Court shall apply the
3 factors set forth in Sullivan to this matter. In determining whether a punitive damages award is
4 grossly excessive or arbitrary, in violation of due process, the court should consider (1) degree of
5 reprehensibility of defendant's conduct, (2) ratio of punitive damage award to actual harm
6 inflicted on plaintiff, and (3) how the punitive damages award compares to other civil or criminal
7 penalties that could be imposed for comparable misconduct. Id. Moreover, in awarding punitive
8 damages, courts must ensure that the measure of punishment is both reasonable and
9 proportionate to the amount of harm to the plaintiff and to the general damages recovered. Id.

10 As the General Manager of Golf Switch, a division of the Debtor, Mr. Chiti was
11 responsible for running the day-to-day operations, including, but not limited to, setting the
12 strategic direction of the company and ensuring that Golf Switch would be the “number one
13 online tee-time provider in North America.” The Court found that the nature of Mr. Chiti’s trust
14 relationship with the Debtor, and the nature of his obligations and duties, did require a high
15 degree of care on his part, imparting him with the fiduciary duty to act honestly and in good faith
16 to the Debtor. As set forth in the Court’s February 21, 2006 Memorandum Decision, Mr. Chiti
17 breached that duty of care by stating to a management level employee, Ms. Klein, and the then
18 President of the Debtor, Mr. Loustalot, that he intended to destroy the Golf Switch Division.
19 Given his background and training, he had the ability to execute and succeed on such a threat.
20 He delayed in booking contracts on the system for the Division which resulted in the Division
21 having cash flow problems shortly before the Debtor filed its bankruptcy petition. Furthermore,
22 he also circulated a memorandum which contained proprietary information to his friends and
23 family without proper Board authorization and without any effort to protect the confidentiality of
24 said information. He was doing this purely for his personal gain: the ability to take over the Golf
25 Switch Division. In light of his leadership role within the company, Mr. Chiti’s conduct was
26 absolutely reprehensible. The Court concludes that the degree of reprehensibility of Mr. Chiti’s
27 conduct is consistent with an award of punitive damages. Factor 1 of the Sullivan test has been
28 met.

1 The Court also notes that the recidivist nature of the defendant's actions may be
2 considered in determining whether Factor 1 has been met. BMW of North America, Inc. v. Ira
3 Gore, Jr., 517 U.S. 559, 576-577, 116 S.Ct. 1589 (1996). Mr. Chiti's testimony on cross
4 examination reflects that he is not performing as a fiduciary for his new company. He has put no
5 effective internal controls in place to prevent him or any other officer from taking improper
6 reimbursements from OpenTech. This type of behavior - a certain sense of entitlement, and a
7 lack of controls, led to his breach of his fiduciary duty to the Debtor. Thus, despite his self-
8 serving testimony, he has not learned his lesson. He is still engaging in the same culpable
9 behavior that he engaged in at the Debtor. The Court is only able to end such conduct by
10 imposing punitive damages.

11 As to Factor 2 of the Sullivan test, the United States Supreme Court has cautioned that
12 the ratio of the award of punitive damages to the actual harm inflicted on the plaintiff must be
13 reasonable. Id. at 580-581. However, a court may consider the harm that has actually occurred as
14 well as the potential harm to the plaintiff. Id. at 581-582. There is no simple mathematical
15 formula in determining an appropriate award, even when the court is considering the potential
16 harm to the plaintiff. Id. at 582-583. Indeed the United States Supreme Court noted:

17 ...low awards of compensatory damages may properly support a higher ratio than high
18 compensatory awards, if, for example, a particularly egregious act has resulted in only a
19 small amount of economic damages. A higher ratio may also be justified in cases in
20 which the injury is hard to detect or the monetary value of noneconomic harm might have
21 been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a
22 categorical approach. Once again, "we return to what we said ... in *Haslip*: 'We need not,
23 and indeed we cannot, draw a mathematical bright line between the constitutionally
24 acceptable and the constitutionally unacceptable that would fit every case. We can say,
25 however, that [a] general concern of reasonableness ... properly enter[s] into the
26 constitutional calculus.'" Id., at 458, 113 S.Ct., at 2720 (quoting *Haslip*, 499 U.S., at 18,
27 111 S.Ct., at 1043).

28 BMW at 583.

1 In this case, the potential for harm to the Debtor was high. If Mr. Chiti had eviscerated
2 the Golf Switch Division's reservation system, continued to delay in the booking of contracts for
3 the Division, and continued to circulate a confidential memorandum outlining the Debtor's
4 finances to third parties, he could have destroyed the Debtor's operations or potentially acquired

1 the Golf Switch Division and the Debtor at consideration substantially below the market price
2 but for his actions. From the Court's standpoint, a multiple of 4 of the actual damages assessed
3 in this matter is reasonable. Hence, the Court concludes that \$5,500 times 4 or \$22,000 is an
4 appropriate award of punitive damages.

5 The final Sullivan factor, how the punitive damage award compares to other civil or
6 criminal penalties, has also been met. In this case, Nevada has set forth a statutory framework
7 for the imposition of punitive damages. Such a framework ensures that conduct which is
8 criminal, which would accord a defendant more constitutional protections, is not being used as a
9 basis or measure of the punitive damages to be assessed. Moreover, Nevada law sets a statutory
10 maximum of \$300,000 on the award of punitive damages in a matter such as this. This Court's
11 award of \$22,000 in punitive damages is consistent with the carefully crafted Nevada statute.

12 B. Choice of Law

13 The Defendant appears to assert, once again, a choice of law argument in his post-trial
14 brief. The Court has previously set forth its analysis as to why a breach of fiduciary duty must
15 be analyzed and resolved based upon the law of the state of incorporation of the entity, not where
16 the alleged defalcations occurred. To the extent that the Defendant now relies on the decision of
17 BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996) in support of his
18 argument, he is incorrect. The problem in BMW was that a court in one state was attempting to
19 assess damages for an action which occurred in another state which was not unlawful in the latter
20 state.

21 In this case, the state of incorporation, Nevada, has a paramount interest in ensuring that
22 the officers and directors of the corporations which are incorporated in that state adhere to the
23 fiduciary duties as outlined under Nevada law. Given the internal dynamics of the dispute
24 between Mr. Chiti and the Debtor, the state of Arizona has no interest in controlling or
25 regulating the fiduciary obligations of the officers and directors to each other and the
26 corporation. The BMW case simply is inapplicable to the facts and law of this case. The Court
27 shall continue to apply the law of Nevada to this controversy.
28


1 **IV. Conclusion**

2 Based upon the foregoing, the Court shall assess a punitive damage award of \$22,000,
3 which Mr. Chiti shall pay to the reorganized Debtor.

4 The Court grants the Defendant's Motion to Strike the testimony and report of Mr.
5 Greco.

6 The Court shall execute a separate Order incorporating this Decision.
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8 DATED this 22nd day of September, 2006.
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12 Honorable Sarah Sharer Curley
13 United States Bankruptcy Judge
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